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INFO RUENB/SECSTATE WASHDC PRIORITY 3706
RUENKX/AMCONSUL HONG KONG 5497
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E.O. 12356: N/A
TAGS: BEXP, CM, ETRD
SUBJECT: JOCT TRADE AND INVESTMENT WORKING GROUP
CHINESE SALES CONTRACT PRACTICES

1. SUMMARY: DESCRIBED BELOW ARE REPRESENTATIVE CASES WHERE U.S. BUSINESSMEN ARE ENCOUNTERING PROBLEMS IMPLEMENTING THEIR CONTRACTS FOR SALE OF GOODS WITH CHINESE ORGANIZATIONS. THESE ARE NON-JOCT CASES WHICH MAY NOT INDIVIDUALLY MERIT DISCUSSION BY JOCT. HOWEVER, THE ISSUES PRESENTED IN THESE CASES ARE REPRESENTATIVE OF PROBLEMS WHICH WERE DISCUSSED IN THE LAST JOCT IN 1988 AND REMAIN UNRESOLVED. THE JOCT CASES WHICH WILL BE DISCUSSED ILLUSTRATE THE ISSUES OF A) ENFORCEMENT OF FOREIGN COURT JUDGEMENTS IN CHINA, B) REFUSAL TO ACCEPT CUSTOM MADE GOODS, AND C) FAILURE BY A CHINESE IMPORTER TO PAY ROYALTY FEES DUE TO ENDUSER'S FAILURE TO PAY THE IMPORTER. THE CASES BELOW PRESENT THE ISSUES OF A) FAILURE TO HONOR COLLECTION DOCUMENTS WHETHER THROUGH LETTER OF CREDIT OR DOCUMENTARY COLLECTION PROCEDURES, B) FAILURE TO SHIP GOODS WHICH CONFORM TO CONTRACTUAL SPECIFICATIONS, AND C) DENIAL OF LIABILITY FOR FAILURE TO SHIP GOODS. WE SUGGEST THAT THESE GENERAL CONTRACTUAL ISSUES COULD BE A BACKDROP FOR JOCT WORKING GROUP DISCUSSION OF JOCT CASES. END SUMMARY.

2. NONE OF THE FIRMS MENTIONED BELOW IN THE REPRESENTATIVE CASES HAVE AUTHORIZED USE OF THEIR NAMES DURING THE JOCT TRADE AND INVESTMENT WORKING GROUP (TIWPG). HOWEVER, THEIR AUTHORIZATION COULD BE OBTAINED IF USOCC BELIEVES THE CASES MERIT INDIVIDUAL MENTION BY JOCT.

REPRESENTATIVE CASES

3. [REDACTED] THIS CASE ILLUSTRATES THE ISSUE OF FAILURE TO HONOR COLLECTION DOCUMENTS. IT ALSO DEMONSTRATES HOW DIFFICULT IT IS TO OBTAIN PAYMENT FROM SOME

CHINESE BUYERS, PARTICULARLY WHERE THE ENDUSER HAS FAILED TO PAY THE CHINESE IMPORTER. THIS CASE IS SIMILAR TO THE [REDACTED] THAT THERE TOO, THE CHINESE ENDUSER HAS FAILED TO PAY THE CHINESE IMPORTER SO THE IMPORTER DOES NOT PAY THE AMERICAN EXPORTER.

4. FACTS - THE AMERICAN FIRM CLAIMS PAYMENT IN THE AMOUNT OF USD 54,775.74 FROM THE CHINESE IMPORTER OR ENDUSER FOR SALE OF [REDACTED] THE EQUIPMENT WAS SHIPPED ON 1 NOVEMBER 1991. THE BANK OF CHINA DID NOT HONOR THE LETTER OF CREDIT COLLECTION DOCUMENTS BECAUSE THEY ALLEGEDLY CONTAINED TOO MANY DISCREPANCIES. [REDACTED] THE EQUIPMENT THROUGH AN AMERICAN DISTRIBUTOR AND IS NOT A DIRECT BENEFICIARY OF THE LETTER OF CREDIT OR A CONTRACTING PARTY FOR THE SALE OF THE EQUIPMENT TO THE CHINESE BUYER. THE DISTRIBUTOR DID NOT OBTAIN PAYMENT FROM THE ENDUSER. THE DISTRIBUTOR HAS RECENTLY SUFFERED FROM A HEART ATTACK AND WILL NOT RECOVER FROM A COMA. (C) ALTHOUGH [REDACTED] IS RIGHTS AND REMEDIES UNDER U.S. LAW, HE IS APPARENTLY UNABLE TO LITIGATE BECAUSE THE DISTRIBUTOR HAS NO ASSETS AND IS UNABLE TO RELEASE DOCUMENTS WHICH WOULD SUBSTANTIATE [REDACTED] CLAIM TO PAYMENT DIRECTLY FROM THE ENDUSER.

5. REMEDY [REDACTED] SEEKS COOPERATION FROM CHINESE AUTHORITIES TO COMPEL THE ENDUSER TO PAY HIM DIRECTLY. ALTHOUGH IT WOULD BE MOST APPROPRIATE FOR [REDACTED] TO SUE THE DISTRIBUTOR IN THE U.S., THIS IS IMPOSSIBLE. NEVERTHELESS, THE ENDUSER STILL HAS AN OBLIGATION TO PAY FOR THE EQUIPMENT AND HAS NOT DONE SO. BECAUSE KESSLER IS A CREDITOR BENEFICIARY OF THE CHINESE SALES CONTRACT, HE IS ENTITLED TO PAYMENT. THE ENDUSER IS BEING UNJUSTLY ENRICHED THROUGH USE OF EQUIPMENT WHICH IT DID NOT PAY FOR.

6. [REDACTED] THIS CASE ALSO ILLUSTRATES CHINESE SELLER'S FAILURE TO HONOR COLLECTION DOCUMENTS AND UNJUST ENRICHMENT BY USE OF EQUIPMENT WHICH IT HAS NOT PAID FOR. CHINESE SALES CONTRACT PRACTICES

ID FOR. IN THIS PROBLEM, THE CHINESE SELLER INDUCED RELIANCE BY THE AMERICAN FIRM TO ACCEPT PAYMENT THROUGH THE DOCUMENTARY COLLECTIONS PROCESS; THEN LATER REFUSED TO TENDER PAYMENT WHEN THE BANK RECEIVED THE COLLECTION DOCUMENTS. THE CHINESE BUYER HAS BREACHED ITS OBLIGATION TO MAKE TIMELY PAYMENT, WHICH IS SIX MONTHS PAST DUE.

7. FACTS [REDACTED] SHIPPED COMPUTER AND SOFTWARE ON 31 MARCH 1992, VALUED AT USD 330,000. THE PAYMENT WAS TO BE MADE "D/P AT SIGHT", MEANING THE DOCUMENTARY COLLECTION PROCESS. NOTE UNDER D/P NO MONEY HAS BEEN SET ASIDE BY THE BUYER. D/P PAYMENT IS A HIGH RISK FORM OF PAYMENT BECAUSE THERE IS NO ASSURANCE OF PAYMENT. [REDACTED] COLLECTING BANK CONTACTED THE HAINAN BANK OF CHINA SEVERAL TIMES TO REQUEST PAYMENT. OUR OFFICE ALSO WROTE TO THE BANK OF CHINA HEADQUARTERS IN BEIJING. UNDER D/P, HAINAN BANK HAS NO OBLIGATION TO DEMAND PAYMENT FROM THE BUYER, IT MERELY TRANSMITS

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PAYMENT. [REDACTED] EVES THE BANK RELEASED THE SHIPPING DOCUMENTS TO THE BUYER WITHOUT OBTAINING PAYMENT, BUT, IT CANNOT SUBSTANTIATE NOW THE BUYER ACTUALLY OBTAINED THESE DOCUMENTS. CHINESE CUSTOMS ALSO COULD HAVE DECIDED TO RELEASE THE GOODS. THE CHINESE BUYER HAS STATED IN LETTERS TO [REDACTED] THAT IT WISHES TO PAY WHEN THE EXCHANGE RATE IS MORE FAVORABLE (LOWER). THE BUYER HAS DISREGARDED ITS OBLIGATION TO TENDER PAYMENT UPON PRESENTATION OF DOCUMENTS, WHICH OCCURRED SIX MONTHS AGO.

7. REMEDY - [REDACTED] REQUESTS THAT THE BANK COLLECT PAYMENT, WHICH THE BANK HAS NO OBLIGATION TO DO.

8. [REDACTED] THIS CASE ILLUSTRATES CHINESE BUYER'S FAILURE TO SUPPLY GOODS AND DENIAL OF LIABILITY FOR DAMAGES RESULTING THEREFROM. THIS CASE IS SIMILAR TO THE PRIOR JOCT CASE ON GULF TRADING. IN THESE THREE CASES, ARBITRATION WAS NECESSARY TO FORCE THE CHINESE BUYER TO PAY COMPENSATION FOR FAILURE TO SHIP GOODS.

9. FACTS - THE CONTRACT CALLS FOR SHIPMENT OF 64 METRIC TONS OF YELLOW CRABFISH BY 30 MARCH 1992. THE SELLER SHIPPED ONLY 23.7 METRIC TONS AND HAS REFUSED TO SHIP ANY MORE. THE FIRM CLAIMS USD 65,989 IN DAMAGES RESULTING FROM THE CHINESE SELLER'S FAILURE TO SHIP ALL THE GOODS AS STIPULATED IN THE CONTRACT.

10. [REDACTED] WROTE TO DALIAN COPIT AND THE EMBASSY REQUESTING ASSISTANCE. THE COMMERCIAL SECTION WROTE TO COPIT AND COFERT. THE CHINESE SELLER WAS ENCOURAGED TO SETTLE THE DAMAGE CLAIM OR SHIP THE FISH. THE ENDUSER DID NOTHING. [REDACTED] ARRIVED IN DALIAN ON 7 DEC 92 TO DISCUSS A SETTLEMENT. AT A LOCAL RESTAURANT THAT EVENING, THE FIRM'S PRESIDENT [REDACTED] WAS STRUCK WITH A BEER BOTTLE BY THE CHINESE FISH SUPPLIER AND NOW FEARS FOR HIS SAFETY. [REDACTED] BELIEVES HE WAS ASSAULTED AT THE REQUEST OF THE CHINESE SELLER TO INTIMIDATE HIM AND DISCOURAGE HIM FROM PURSUING HIS CLAIMS FURTHER. THE COMMERCIAL SECTION ADVISED COPIT OF [REDACTED] ARRIVAL IN DALIAN, DESIRE TO SETTLE, AND FEAR OF ASSAULT.

11. REMEDY - [REDACTED] WANTS TO BE COMPENSATED FOR ITS LOSSES IN THE AMOUNT OF USD 65,989.

12. [REDACTED] THIS CASE ILLUSTRATES THE DIFFICULTY SMALL TRADING FIRMS ENCOUNTER WHEN THEY RECEIVE DEFECTIVE GOODS FROM A CHINESE SELLER. BECAUSE THE CHINESE SUPPLIER HAS SUPPLIED THE DEFECTIVE GOODS, THE CHINESE EXPORTER REFUSES TO COMPENSATE THE AMERICAN BUYER. I

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13. FACTS - [REDACTED] CONTRACTED TO PURCHASE LAMPS AND LIGHT BULBS ACCORDING TO CERTAIN SPECIFICATIONS, ONE OF WHICH WAS THAT THE ITEMS OPERATE ON 110 VOLTAGE OF CHINESE 220 VOLTAGE. [REDACTED] CLAIMS USD 10,000 IN DAMAGES FOR DEFECTIVE GOODS AND INADEQUATE PACKAGING FROM [REDACTED] THE COMMERCIAL SECTION HAS

WRITTEN TO THE HUNAN COMMISSION ON FOREIGN ECONOMIC RELATIONS AND TRADE (COFERT) FOUR TIMES AND SUPPLIED FULL DOCUMENTATION OF THE CLAIM TWICE. WE ALSO WROTE TO THE VISAIR FOR HUNAN. WE HAVE NOT RECEIVED A RESPONSE DESPITE OUR NUMEROUS INQUIRIES.

14. REMEDY - [REDACTED] PAYMENT OF DAMAGES IN THE AMOUNT OF USD 18,888.

15. [REDACTED] THE FIRM CLAIMS DAMAGES, IN THE AMOUNT OF USD 78,288, DUE TO RECEIPT OF DEFECTIVE GOODS FROM GUANGDONG ARTS AND CRAFTS I/E CORP. THIS FIRM HAS BEEN UNABLE TO RECOVER ITS BUSINESS LOSS.

16. IF THESE CONTRACTUAL ISSUES ARE TO BE DISCUSSED BY JOCT WORKING GROUPS, WE SHOULD SOLICIT SUGGESTIONS FROM JOCT CONCERNING HOW AMERICAN FIRMS SHOULD HANDLE THESE PROBLEMS. WE HAVE ATTEMPTED TO WORK WITH PROVINCIAL COFERTS BUT HAVE NOT HAD MUCH SUCCESS. AMERICAN FIRMS ARE STILL RELUCTANT TO RESORT TO ARBITRATION OR LITIGATION IN CHINA BECAUSE THEY DOUBT THE OBJECTIVITY AND COMPETENCE OF THESE LEGAL FORUMS. GCS: ESULLIVAN ROY

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